

**HO HUAN CHONG & ORS. v.
PUBLIC PROSECUTOR**

[A.Cr.J. (Ajaib Singh J.) January 18, 1980]

[Seremban — Criminal Application No. 1 of 1980]

Criminal Law and Procedure — Bail — Dangerous Drugs — Having under control — Dangerous Drugs Ordinance, 1952, ss. 12(2) & (3), 39A and 41B.

The applicants in this case applied for bail. They were jointly charged with having under their control 7.4 gms of heroin an offence under section 12(2) and punishable under section 39A of the Dangerous Drugs Ordinance. They applied on several grounds and the High Court in this case considered the ground "that there was no certainty that the amount of heroin recovered was 7.4 gms." The prosecution said that the three persons were arrested in a hotel room and from one of them the police recovered a powdery substance 7.4 gms in weight and suspected to contain heroin. This powdery substance had been sent to the chemist for analysis. The prosecution conceded that it was not in a position to say definitely that the amount of heroin would amount to 7.4 gms as stated in the charge as the chemist had not yet ascertained the actual amount of heroin which may be found in the powdery substance.

Held: (1) where the granting of bail is dependent on the quantity of any dangerous drug then the exact amount of this dangerous drug which was to be stated in the charge assumed great importance. The prosecution should therefore refrain from mentioning the amount of the drug if the prosecution was not in a position to ascertain the exact amount of the drug when an accused person was first charged in court. Otherwise the charge need not state the quantity of the drug concerned and if there was no other valid reason why bail was not granted the accused should be offered bail;

(2) in this case the provisions of section 41B could not be invoked because the relevant condition in subsection (1)(b) of section 41B had not been strictly fulfilled;

(3) in the absence of any other valid impediment to the granting of bail the three accused persons ought to be released on bail. The court allowed the bail in the sum of \$3,000 with one surety each.

[**Editorial Note:** The chemist's report was made available to the learned magistrate on February 12, 1980 wherein the amount of heroin was stated to be 4.22 grammes out of the total of 7.4 grammes of the powdery substance. The prosecution thereafter amended the charge to one under section 12(2) and punishable under section 12(3) of the Dangerous Drugs Ordinance 1952. The 1st accused pleaded guilty and was convicted and sentenced to a day's imprisonment and a fine of \$1,500. The prosecution withdrew the charge against the 2nd and 3rd accused.]

CRIMINAL APPLICATION.

Datuk Balwant Singh for the applicants.

Suriyadi bin Halim Omar (Deputy Public Prosecutor) for the respondent.

Ajaib Singh J. (delivering oral judgment): An important point on the question of bail has arisen in this application in relation to certain offences under the Dangerous Drugs Ordinance, 1952. Under section 41B of this Ordinance no court has any jurisdiction to grant bail to an accused person in certain circumstances. But before this section becomes applicable and bail is refused the court must be satisfied that the conditions on which the section is to be invoked have been strictly complied with. Section 41B reads as follows —

"(1) Bail shall not be granted to an accused person charged with an offence under this Ordinance —

- (a) where the offence is punishable with death; or
- (b) where the offence is punishable with imprisonment for more than five years; or

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(c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

(2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary."

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The three applicants in this case are jointly charged with having under their control 7.4 grammes of heroin an offence under section 12(2) and punishable under section 39A of the Dangerous Drugs Ordinance. If the amount of heroin had been stated to be less than five grammes in weight the offence would have been punishable under section 12(3) with a fine not exceeding twenty thousand dollars or to imprisonment for a term not exceeding five years or to both such fine and imprisonment. Under section 39A however the offence is made punishable with imprisonment for a term not exceeding fourteen years and not less than three years and with whipping of not less than six strokes if the drug involved being heroin or morphine is five grammes or more in weight. As the charge stands therefore bail was rightly refused by the learned Magistrate because the offence carried a term of imprisonment of more than five years.

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The three accused persons have now applied to the High Court for bail on several grounds but only one ground appears to be worthy of consideration namely that there was no certainty that the amount of heroin recovered was 7.4 grammes. The learned Deputy Public Prosecutor said that the three persons were arrested in a hotel room and from one of them the police recovered a powdery substance 7.4 grammes in weight and suspected to contain heroin. This powdery substance has been sent to the chemist for analysis. The learned Deputy Public Prosecutor conceded that he was not in a position to say definitely that the amount of heroin would amount to 7.4 grammes as stated in the charge as the chemist has not yet ascertained the actual amount of heroin which may be found in the powdery substance.

The provisions of section 41B of the Dangerous Drugs Ordinance are of a serious nature. They deprive a person of his liberty so that it becomes the duty of the court to see that the conditions under which an accused person is to be refused bail are strictly followed. It is true that on the face of it as the charge stands in the present case bail is not to be granted. But where bail for any offence is disallowed by law under certain circumstances such as those found in section 41B of the Dangerous Drugs Ordinance then the court is perfectly entitled to inquire further into the matter and satisfy itself whether any condition precedent to the disallowing of bail has been fulfilled. In dangerous drug cases there is a tendency on the part of the prosecution to include in the charge the total amount of any substance suspected to contain a dangerous drug and later at some stage of the proceedings when the chemist report is at hand to have the charge amended by reducing the amount of the drug in accordance with the findings of the chemist. This may or may not be a commendable practice yet it should not be of much concern where an accused person is not put to any disadvantage on the question of bail. But where the granting of bail is

dependent on the quantity of any dangerous drug then the exact amount of this dangerous drug which is to be stated in the charge assumes great importance. The prosecution should therefore refrain from mentioning the amount of the drug if the prosecution is not in a position to ascertain the exact amount of the drug when an accused person is first charged in court. Otherwise the charge need not state the quantity of the drug concerned and if there is no other valid reason why bail should not be granted the accused should be offered bail and the case adjourned for a few weeks for mention so that the position may be reviewed when the chemist report is available.

In the present case I am of the view that the provisions of section 41B cannot be invoked because the relevant condition in subsection (1)(b) of section 41B has not been strictly fulfilled. It cannot be said that the offence which the three accused persons are facing carries a term of imprisonment of more than five years under section 39A because there is no certainty that the actual amount of heroin which may be eventually found in the powdery substance would be five grammes or more in weight. And in the absence of any other valid impediment to the granting of bail the three accused persons ought to be released on bail. I therefore allow bail in the sum of \$3,000 with one surety each and I shall reconsider their position after the actual amount of heroin is ascertained in due course.

Bail allowed.

Solicitors: *Datuk Balwant Singh.*

TAN ENG CHOON v. TAY BOON SEE

[O.C.J. (Wan Yahya J.) March 19, 1980]

[Malacca — Originating Summons No. 20 of 1979]

Landlord and Tenant — Lease — Construction of — Meaning of "in proportion to the increase of the assessment"

The plaintiff in this case sought for the true construction of a lease, clause 5 of which stipulates that "in the event of the assessment being increased by the government during the unexpired term of the lease the lessee agrees and undertakes to increase the rent payable to the lessor in proportion to the increase of the assessment." The monthly rent payable then was \$140. The yearly assessment rate was increased from \$86.40 to \$129.60 by the District Council with effect from January 1, 1976. The new assessment represented a 50% increase from the old rate.

The plaintiff contended that his monthly rental should be proportionately increased by 50%. The defendant disputed this.

Held: clause 5 of the said lease meant that the lessee had stipulated to pay the lessor an increase in the rent in the same ratio as the increase in the assessment, i.e. by 50%. The rent payable by the lessee would therefore similarly appreciate from \$140 per month to \$210 per month.

ORIGINATING SUMMONS.

Humfrey Ball for the plaintiff.

D.A. Devadason for the defendant.

Cur. Adv. Vult.

Wan Yahya J.: This matter arose from an originating summons filed by the plaintiff seeking a declaration for the true construction of a lease.

On August 4, 1969 the plaintiff's predecessor in title and father leased to the defendant Holding No. 13 in the Mukim Village of Merlimau in Jasin District together with the premises erected thereon for a fixed period of 59 years with effect from August 15, 1969 and terminating on August 14, 2026. Clause 2 of the Annexure to this lease states that the monthly rental for the premises was \$140 per mensem payable in advance on or before the 29th day of each calendar month.

By clause 5 the parties stipulated further on the rent as follows:

"5. In the event of the assessment being increased by the Government during the unexpired term of the lease the lessee agrees and undertakes to increase the rent payable to the lessor in proportion to the increase of the assessment."

The yearly assessment rate was increased from \$86.40 to \$129.60 by the District Council with effect from January 1, 1976. The new assessment represented a 50% increase from the old rate.

The plaintiff contends that his monthly rental should be proportionately increased by 50%. The defendant disputes this.

Counsel for the defendant argued that the phrase 'in proportion to the increase of the assessment' merely means the breaking down of the assessment for the year into 12 monthly proportions for the purpose of adding up that amount to the monthly rental. Thus he argued the increase in this case of \$43.20, when divided by 12, would give a sum of \$3.60. This should be added to the monthly rental of \$140 to give a new increased rental of \$143.60.

The plaintiff's counsel, however, felt that the increase in rental should be proportionate to the increase in assessment and the proper calculation of the new rate should be by increasing the old rental in the same proportion by which the assessment has been increased, i.e. by 50%. It follows therefore that an increase by 50% of the old rental of \$140 would be \$70 and the new increased rental will add up to \$210.

It was strongly urged by counsel for the defendant that I should adopt a principle of purposive interpretation in this case and take into consideration what the parties had in mind when they executed the lease. He drew my attention in particular to a passage appearing on page 16 of the book by Lord Denning entitled "The Discipline of the Law" which ran as follows:

"The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach'... In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done, had they had the situation in mind."

I am sure counsel had cited these in the persuasive rather than the authoritative vein, but then these are none the less the words of no lesser personality than Lord Denning himself and therefore merit vene-